

ISSUES

The Administrative Law Judge (ALJ) determined claimant suffered accidental injury on May 30, 2002, arising out of and in the course of her employment. As a result the ALJ determined claimant suffered a 13 percent permanent partial scheduled disability to the left lower extremity. This rating was an average of the ratings provided by Dr. Pedro A. Murati (22 percent) and Dr. Daniel Prohaska (4 percent).

The respondent requests review of whether the ALJ erred in finding the claimant's accidental injury arose out of and in the course of employment as well as the nature and extent of disability. Respondent notes the claimant said the respondent's owner was three feet away when she fell while grooming a dog and a co-worker was assisting her when the fall occurred. But neither the owner nor the co-worker recalled the incident. Respondent argues claimant did not sustain her burden of proof that she suffered an accidental injury arising out of and in the course of employment.

In the alternative, if the claim is determined to be compensable, the respondent argues the claimant is only entitled to a 4 percent permanent partial scheduled disability to the left leg based on Dr. Prohaska's rating.

Claimant argues that she has sustained her burden of proof to establish she suffered accidental injury arising out of and in the course of her employment and therefore should be entitled to a 22 percent permanent partial scheduled disability to the left leg based on Dr. Murati's rating.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant began her employment as a dog bather with the respondent in March 12, 2002. Claimant's duties were bathing and then using a dryer to blow dry the animals. On May 30, 2002, claimant had muzzled a German shepherd and it reacted by trying to jump off the grooming table. Claimant testified that she twisted her left knee while trying to prevent the dog from getting off the table. She further testified that respondent's owner, Diane Thompson was only a few feet away, grooming a dog and watched the incident. Claimant testified that she told Diane Thompson that she had injured her knee.

Claimant was then assisted by a co-worker, Jimmy Bishop, in order to get the dog to the floor. As the two were getting the dog off the grooming table the claimant got caught in the dog's lead and fell to the floor landing on her left knee. Claimant testified that Diane Thompson told her to finish brushing the dog on the floor. So claimant sat on her knees for two hours while she finished brushing the dog.

Claimant was unsure whether either the owner or the co-worker saw her fall onto her knee. Claimant testified that she told the owner that she thought she had hurt her knee but claimant did not ask for medical treatment.

On May 31, 2002, claimant sought treatment at Newton Medical Center's emergency room. The emergency department record contained a history that claimant was working with a very large dog and claimant fell on her knee.² The Emergency Physician Record contained a history that as claimant was brushing a German Shepherd dog it went wild and while trying to calm the dog the claimant tripped over the dog and twisted her knee.³ Claimant was given medication for pain, placed in a knee mobilizer and taken off work until June 4, 2002. Since the medication made claimant sleepy, she decided to go to her father's house which was only two blocks from the hospital. She fell asleep and did not contact her employer.

Before the alleged work-related incident on May 30, 2002, the claimant had been counseled and warned that if she were late to work one more time that she would be terminated. Claimant was scheduled to work the Friday, Saturday and Monday after her injury. She did not call at all on Friday, called late afternoon on Saturday even though she was to report to work at 9 a.m. and then appeared at work several hours after her shift had begun on Monday. Claimant testified that she knew that because she had failed to call in she was going to be terminated.

When claimant did call the respondent on Saturday, June 1, 2002, she asked the owner when she could retrieve her check but failed to mention anything about her knee injury. On Monday, claimant was to report to work at 9 a.m. and did not show up until late morning or early afternoon. Claimant had a conversation with Diana Thompson and advised her that she had sought medical treatment regarding her knee and also provided the notes from the emergency room visit. Claimant testified she told the owner that she had hurt her knee in the incident with the German shepherd.

Ms. Thompson testified she was not aware claimant had fallen at work nor was she aware claimant had difficulty with a German shepherd dog even though they were working in close proximity. Ms. Thompson testified the claimant was terminated effective May 31, 2002, because she did not report to work and had failed to call. Ms. Thompson testified she had not been advised by the claimant about the injury during any of the conversations that had taken place. But she agreed that after claimant left on Monday, she then read the emergency room notes which indicated a work-related injury.

² P.H. Trans., Cl. Ex. 1 at 4.

³ Id. at 3.

Jimmy Bishop, the respondent's owners' nephew, worked with the claimant. Mr. Bishop testified he did not witness the claimant being injured by twisting her knee trying to control an unruly dog, nor did he ever observe claimant working on the floor while she brushed out a dog. Mr. Bishop did recall helping claimant get a large German shepherd dog off the grooming table but he did not recall claimant getting caught in the lead and falling to the ground. But Mr. Bishop agreed that he helped with large dogs on other occasions and did not know if the time he helped with the dog was on May 30, 2002. He further noted it was likely claimant worked with German shepherds on other occasions.

Dr. Daniel J. Prohaska conducted an examination of the claimant on October 29, 2002. Dr. Prohaska ordered an MRI and x-rays of claimant's knee. The doctor diagnosed the claimant as having patellofemoral pain and a component of patellar tendinitis. Dr. Prohaska recommended a knee sleeve with a lateral pad and also anti-inflammatory medication. On December 10, 2002, the claimant returned to Dr. Prohaska with complaints of a catch in her knee and worsening knee pain. Dr. Prohaska recommended interarticular cartilage knee injection.

Dr. Prohaska diagnosed claimant's condition as patellofemoral syndrome with lateral patellar compression syndrome and articular chondral flap. On January 29, 2003, the doctor performed arthroscopic surgery on claimant's left knee which consisted of a lateral release as well as chondral shaving to remove a flap of loose articular chondral cartilage. After surgery, the claimant had physical therapy and continued with the knee sleeve as well as anti-inflammatory medication.

At her office visit on March 13, 2003, claimant complained of a popping and catching in the area of her patella. On April 24, 2003, the claimant had another knee injection. On June 5, 2003, claimant provided a history of her knee giving out. Finally, on November 20, 2003, the claimant returned to see Dr. Prohaska and noted overall improvement of her condition but she still complained of knee pain. The doctor conducted a physical examination which resulted in normal findings. The doctor noted there was no crepitation, no weakness, no joint line pain, no facet pain, good patellar mobility and full strength in her lower extremity. Dr. Prohaska determined the claimant had reached maximum medical improvement. Based on the *AMA Guides*⁴, Dr. Prohaska opined the claimant had a 4 percent permanent impairment to the left lower extremity.

At regular hearing, the claimant noted that the main problem with her knee is with bending, as when she is kneeling to bathe her children. Otherwise, she testified she has no problems with walking or standing and the knee is stable and does not give out.

⁴ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

At her attorney's request, the claimant was examined by Dr. Pedro A. Murati on May 8, 2003. At that time claimant complained of a catching in her knee; a popping in her knee; her knee giving out; and pain walking or standing. Dr. Murati diagnosed claimant status post arthroscopic lateral release and debridement of chondral flap of the medial femoral condyle and with patellofemoral syndrome of the left knee.

Dr. Murati opined the claimant's current diagnoses were a direct result of her work-related injury. Based on the *AMA Guides*, Dr. Murati rated the status post arthroscopic lateral release at 5 percent impairment to the left lower extremity; for the patellofemoral syndrome of the left knee, claimant received a 5 percent impairment to the left lower extremity; for the 1.8 centimeter atrophy of the left thigh, claimant received an 8 percent impairment to the left lower extremity; and, for the mild anterior drawer, claimant received a 7 percent impairment to the left lower extremity. Using the Combined Values Chart, the left lower extremity impairments combine for a 22 percent impairment to the left lower extremity. Dr. Murati recommended the claimant return to work as tolerated.

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.⁵ A claimant must establish that her personal injury was caused by an "accident arising out of and in the course of employment."⁶ The phrase "arising out of" employment requires some causal connection between the injury and the employment.⁷

The claimant alleged injury as a result of a specific incident on May 30, 2002, while grooming an unruly German shepherd dog. The contemporaneous medical records from the emergency room the following morning contain histories that claimant suffered injury to her knee while grooming a large dog at work.

Respondent's owner testified that she worked in close proximity with claimant and was unaware claimant had fallen at work. She was also unaware claimant had a problem while working with a German shepherd dog. Jimmy Bishop, a co-worker, testified that he never witnessed claimant twisting her knee while working with an unruly dog. And he never witnessed claimant on the ground brushing out a dog for two hours. Although the co-worker recalled helping claimant get a German shepherd dog off the grooming table without claimant falling, he could not state that it occurred on May 30, 2002. And he agreed claimant likely would have worked on such animals on many other occasions.

⁵ K.S.A. 44-501(a) (Furse 2000); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

⁶ K.S.A. 44-501(a) (Furse 2000).

⁷ *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

The ALJ determined that claimant's testimony as well as the contemporaneous medical records were persuasive that claimant injured her knee performing her work duties as a groomer. The Board agrees and affirms.

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.⁸ Medical evidence is not essential to the establishment of the existence, nature and extent of an injured worker's disability.⁹

Although the claimant had numerous complaints with her knee when examined by Dr. Murati on May 8, 2003, she was at that time continuing to receive medical treatment from Dr. Prohaska. By the time of the regular hearing on November 4, 2003, the claimant noted she had knee pain if she would kneel on her knee, otherwise, she did not have the same complaints she had made to Dr. Murati. At her last visit with Dr. Prohaska, the claimant only complained of pain with prolonged kneeling which was the same complaint the claimant had voiced at regular hearing.

Dr. Prohaska stated he utilized the *AMA Guides* but did not further explain how he arrived at his 4 percent rating which does not conform with the tables in the *AMA Guides* utilized by Dr. Murati. Conversely, at the time of Dr. Murati's examination the claimant voiced some complaints which apparently later resolved. Accordingly, the Board affirms the ALJ's determination that claimant suffers a 13 percent permanent partial scheduled disability to the left leg.

As previously noted, the ALJ's Award was calculated based upon a 190-week scheduled disability to the lower left leg. Because the injury was to her knee, claimant is entitled to compensation based upon a 200-week scheduled disability to the left leg. Consequently, the Board modifies the ALJ's calculation of compensation due claimant to reflect a 13 percent permanent partial scheduled disability to the left leg.

AWARD

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated February 6, 2004, is modified to reflect claimant suffered a 200-week scheduled disability to the left leg and affirmed in all other respects.

⁸ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 rev. denied 249 Kan. 778 (1991).

⁹ *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

The claimant is entitled to 4 weeks of temporary total disability compensation at the rate of \$218.58 per week in the amount of \$874.32 followed by 25.48 weeks of permanent partial disability compensation at the rate of \$218.58 per week in the amount of \$5,569.42 for a 13 percent loss of use of the left leg, making a total award of \$6,443.74.

IT IS SO ORDERED.

Dated this _____ day of August 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Matthew Schaefer, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director